

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
FIRST REGION**

In the Matter of

ENTERGY NUCLEAR OPERATIONS, INC.

Employer-Petitioner

and

UTILITY WORKERS UNION OF  
AMERICA LOCAL UNION NO. 369, AFL-  
CIO

Union

Case 1-UC-866

**DECISION AND CLARIFICATION OF BARGAINING UNIT<sup>1</sup>**

The Employer-Petitioner, Entergy Nuclear Operations, Inc. (Entergy), operates a nuclear power plant called Pilgrim Nuclear Power Station (Pilgrim) in Plymouth, Massachusetts. In this matter, Entergy seeks to clarify an existing unit of production and maintenance employees at Pilgrim, to exclude the positions of procurement specialist I

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<sup>1</sup> Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held before a hearing officer of the National Labor Relations Board. In accordance with the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the Regional Director.

Entergy originally filed two petitions in this matter, in Cases 1-UC-866 and 1-UC-867, which were consolidated for hearing. At the hearing, based on an agreement between the parties, the Employer withdrew the petition in Case 1-UC-867, in which it sought to exclude certain positions from a bargaining unit as confidential.

Upon the entire record in this proceeding, I find that: 1) the hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed; and 2) the Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction in this matter.

and procurement specialist II, on the ground that the positions are managerial. The Union contends that the petition should be dismissed on various procedural grounds and that, on the merits, the procurement specialists are non-managerial employees. I find that the procurement specialists I and II are managerial employees and shall clarify the unit to exclude them.

#### Entergy's operations and bargaining history

Entergy Nuclear Operations, Inc. operates six nuclear power plants in the northern part of the country, including Pilgrim. Another entity called Entergy Operations, Inc. operates several nuclear power plants in the southern part of the country.<sup>2</sup>

Boston Edison Company opened Pilgrim in 1972, and Entergy acquired the plant in 1999. There are currently around 650 employees at Pilgrim, including a unionized workforce of about 500 employees divided among four bargaining units. The procurement specialists at issue, commonly referred to as "buyers," are included in a production and maintenance, office, technical and professional unit, referred to as the production and maintenance unit, which is currently represented by the Utility Workers Union of America Local Union No. 369. It appears from the Recognition and Representation article in a 2004-2008 collective-bargaining agreement covering this unit<sup>3</sup> that the current production and maintenance unit resulted from the 1987 merger of three different bargaining units that were originally certified by the NLRB in 1950. The record does not reveal how long the procurement specialists have been included in the production and maintenance unit, except that they have been in the unit since at least 2000.

The three other bargaining units at Pilgrim are 1) a unit of technical employees represented by Local 369, 2) a unit of professional and technical employees, referred to as the engineering unit, represented by Local 590 of the Utility Workers of America, and 3) a unit of security guards.

#### Supervisory structure of the Materials, Purchasing and Contracts Department

Procurement Supervisor Diane Ramsey, who works in the Materials, Purchasing and Contracts Department at Pilgrim, oversees a group of six individuals, including those in the three procurement specialist positions at issue. Two of the positions at issue are held by Procurement Specialist I Dave Fennessey and Procurement Specialist II Debbie Martin. In addition, there is a third, vacant procurement specialist I position, to which administrative assistant Donna Furtado has been temporarily upgraded, on a part-time

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<sup>2</sup> The record does not reveal the relationship between Entergy Nuclear Operations, Inc. and Entergy Operations, Inc.

<sup>3</sup> In a post-hearing stipulation, the parties agreed to the admission of a contract covering the production and maintenance unit, which has effective dates from July 14, 2004 to May 15, 2008.

basis.<sup>4</sup> Three technical specialists, Robert Murray, Michael Hepburn, and Richard McCue, also report to Ramsey.<sup>5</sup>

Ramsey reports, in turn, to Manager of Materials, Purchasing, and Contracts Thomas “Eric” Parr, the highest level manager in this department at Pilgrim.<sup>6</sup> Parr and his counterparts at various other nuclear plants owned by Entergy report to Sam Davis, Senior Manager of Materials, Purchasing, and Contracts, in White Plains, New York.

#### The initiation of the procurement process

The function of Ramsey’s group is to procure the materials needed to keep Pilgrim running, in a timely and cost-effective manner. Most requests for parts at Pilgrim are generated from an entity referred to as the “Planning Group.”<sup>7</sup> The Planning Group submits “material requests” to the technical specialists in Ramsey’s group. The material requests set forth the item that is needed, the quantity needed, and the estimated cost.

The technical specialists in Ramsey’s group then perform a technical review of the material request, process it, and convert it into a purchase requisition. The technical specialists also establish a minimum and maximum level for the inventory of certain parts, based on past history of usage, such that a reorder notice will be automatically generated when inventory reaches a certain level. In the case of “safety-related” items, the technical specialists send the requests for review by a department called Procurement Engineering, which makes sure that the item requested is the correct part for Pilgrim’s system. Procurement Engineering may also require some clauses to be included in contracts with vendors.

After review by the technical specialists and/or Procurement Engineering, the technical specialists forward the purchase requisitions electronically, using computer software called “INDUS,” to the procurement specialists’ electronic in-baskets, where the

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<sup>4</sup> Entergy seeks to exclude the procurement specialist position that is being filled on a temporary basis by Furtado. While Ramsey testified that Furtado has been temporarily upgraded to fill a procurement specialist position that has been open since February 2006, a current organizational chart submitted into evidence by Entergy, Employer Exhibit 21, shows a vacancy for a technical specialist reporting to Ramsey, but does not show a vacancy for a procurement specialist. There is no explanation in the record for the discrepancy.

<sup>5</sup> Murray and Hepburn are in the engineering unit represented by Local 590, and McCue is in the technical unit represented by Local 369.

<sup>6</sup> In addition to overseeing Ramsey’s procurement group, Parr also oversees a group of employees who appear to serve a warehouse function, which is headed by Supervisor of Materials Steven Cook.

<sup>7</sup> The Planning Group, which is staffed largely by bargaining unit employees, works with Pilgrim’s maintenance department regarding the maintenance work that has been scheduled at the plant and the parts that are needed for the work.

requests appear in their backlog. The purchase requisitions forwarded to the procurement specialists indicate the part requested, the quantity, the estimated cost, the need date for the part, and the work order with which it is associated. Procurement specialists do not determine which parts to purchase or the quantity of parts to be purchased, all of which is determined by the operational department that requested the material, the technical specialists, and/or Procurement Engineering.

#### The role of the procurement specialists

It is the procurement specialist's job to find a vendor for each requested item and then to execute a purchase order between Entergy and the vendor, which commits Entergy to pay for the item upon receipt.<sup>8</sup> Martin and Fennessey have been procurement specialists for many years.<sup>9</sup> The procurement specialist II position held by Martin is a higher level position and is somewhat higher paid than the procurement specialist I position. The procurement specialists' workloads are generally divided by "commodity," although the two fill in for one another when one of them is absent or overloaded. Martin generally handles purchase requisitions for mechanical parts such as valves and pumps, while Fennessey generally handles purchase requisitions for electronic parts, such as instrumentation and controls, relays, breakers, and capacitors.<sup>10</sup> Martin and Fennessey have been training Furtado since she was upgraded in 2007. Martin assigns work to Furtado, generally giving her easier, non-safety related purchases that she would be capable of handling.<sup>11</sup>

Once the procurement specialists have a purchase requisition, it is their job to convert the purchase requisition into a purchase order with a vendor. The procurement specialists are responsible for selecting a vendor for each item.<sup>12</sup> In the case of "sole

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<sup>8</sup> Thus, a purchase *requisition* is an internal document requesting the procurement specialists to purchase an item, while a purchase *order* is a document reflecting Entergy's commitment to pay a vendor for an item.

<sup>9</sup> Martin has been with the company for over 30 years, the majority of which she has worked in procurement, and Fennessey has been there for 20 years. Martin has a bachelors degree and a purchasing manager's certificate, while Fennessey may have a masters degree.

<sup>10</sup> The procurement specialists do not purchase items such as nuclear fuel or nonpermanent plant equipment such as ceiling tiles or light bulbs.

<sup>11</sup> There is no contention by Entergy that Martin's role in assigning work to Furtado warrants her exclusion from the unit as a statutory supervisor.

<sup>12</sup> Entergy has two or three "general service agreements" with certain vendors, as for example, a vendor that supplies nuclear instrumentation. These are long-term agreements under which Entergy agrees to pay in installments for a certain number of items per year at set prices. There is no evidence that the procurement specialists negotiate the general service agreements. In the case of general service agreements, the role of the procurement specialists is to track how many of the items have been received.

supplier” items, there is only one possible vendor, but in other cases the procurement specialist must select among vendors. Some purchase requisitions include a suggested vendor, but the procurement specialist is not obligated to purchase from the suggested vendor. In deciding which vendor to use, the procurement specialists may discuss the matter with the technical specialists. The procurement specialists may obtain parts routinely requested from a regular source that the procurement specialists have used in the past. They may search a manufacturer’s website for distributors. They may also search for parts using a software system called “RAPID,” which lists parts available from nuclear plants across the country.

Procurement specialists solicit quotes from vendors. They may obtain an informal quote by telephone or e-mail, or they may issue a formal request for a quote through the INDUS system.<sup>13</sup> In deciding on a vendor, they may consider cost, the vendor’s ability to meet the required delivery schedule, and the reliability of the vendor. They may negotiate the cost if they are not satisfied or may seek another vendor. In addition to negotiating over the cost of the item, they may negotiate over other charges, such as documentation charges, certification charges,<sup>14</sup> and expediting fees. If a vendor has a technical question, the procurement specialists try to obtain the answer from the technical specialists, Procurement Engineering group, or the requesting department, or they may put the vendor in touch with the appropriate person.

In selecting vendors, Entergy draws a distinction between “safety-related” and “non-safety-related” parts. For safety-related parts, procurement specialists are required to use vendors on the “qualified suppliers” list, who have met certain requirements established by Entergy’s Quality Assurance Department.<sup>15</sup> At least half of the items purchased by the procurement specialists are safety-related. Entergy does not maintain a list of approved vendors for non-safety-related items. If procurement specialists find a new vendor for a non-safety related item, they send certain paperwork into Entergy’s Accounts Payable Department, which checks whether the vendor is solvent and otherwise suitable before adding the vendor into the system.

Because Pilgrim is an older plant, many of its parts are obsolete and difficult to find. If the procurement specialists know that a requested part is difficult to find, they may suggest, for example, that the plant buy two rather than one.<sup>16</sup> They may go to the

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<sup>13</sup> They may request a formal quote in the case of a new vendor or new item.

<sup>14</sup> It appears that, in some cases, there must be a certification that an item has been tested and that it meets certain specifications.

<sup>15</sup> The same qualified suppliers list is used throughout Entergy’s “fleet” of nuclear power plants. Ramsey testified that procurement specialists may suggest to Quality Assurance that a vendor be added to the qualified suppliers list, but this has not happened since she became the procurement supervisor in November 2005.

<sup>16</sup> For example, in an e-mail exchange submitted into evidence, Fennesey wrote to Ramsey that ordering only one tachometer would leave Entergy with no stock and asked her to please let him know [how many to order].

original manufacturer or use the RAPID system to try to negotiate with other utilities that may have one in stock to sell. If they cannot find the part, they may work with the Procurement Engineering group to determine if a substitute part or a design change will solve the problem.

In the case of non-recurring purchases for items over \$10,000, procurement specialists are required to follow a bidding procedure under which they issue a Request For a Quote and obtain at least three bids.<sup>17</sup> The procurement specialists may identify the bidders.

If the procurement specialists are unable to find a vendor who can deliver the part on time, they notify the requesting department to see if the date for the scheduled work can be changed. They may request expedited delivery of a part from a vendor, but they do not have authority to approve expediting fees charged by a vendor, which may be approved only by the initiating department.

Once the procurement specialists work out the details with the vendor, they send a signed copy of the purchase order to the vendor. In the case of certain parts, referred to as “Q” parts, the items must be received and inspected by an Entergy receipt inspector to verify that certain conditions have been met, before Entergy will pay for the part.

Procurement specialists are responsible for resolving “mismatches,” i.e., instances in which the cost on an invoice sent to Entergy’s accounts payable department does not match the amount on the purchase order. The procurement specialists contact the vendor to resolve the issue and may issue a revised purchase order, if necessary. If the cost on an invoice for an item exceeds the price the vendor originally quoted to the procurement specialist, the procurement specialist has the leeway to approve invoices that are up to \$2500 over the quoted price.

Procurement specialist Martin plays a role in Entergy’s “vendor stocking” program, an inventory management arrangement that it has with a company called Rexell, a parts distributor. Under this program, it appears that Rexell sends parts to Entergy’s warehouse, but Entergy pays for the parts only once it uses them. Entergy stock handlers and Rexell personnel monitor usage. Martin acts as the conduit between Entergy and Rexell and reviews what parts Entergy will stock under the program based on feedback from others.

Parr testified that Martin has also been involved in two to three “Entergy Continuous Improvement” (ECI) initiatives. The purpose of the ECI program is to provide Entergy employees an opportunity to make improvements, such as saving money or improving safety. Specifically, in 2005, Martin was “involved” in an ECI initiative to change the vendor that Entergy uses for office supplies, which has resulted in 50 percent

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<sup>17</sup> A bidding process is not required if the plant needs an item on an emergency basis or if the vendor is the sole source for the item.

savings in Entergy's annual costs for office supplies. The record does not reveal precisely what Martin's involvement in effectuating this change was, although Parr testified that it was a group idea.<sup>18</sup> Under the new regime, only office supplies, and not other types of items, may be ordered from Entergy's new supplier, W.B. Mason, and Martin authorizes any purchases from W.B. Mason.

#### Limits on the procurement specialists' spending authority

The procurement specialists are authorized to make purchases in amounts up to \$10,000. Transactions with an estimated cost that is greater than \$10,000 must be routed to Parr for approval first, who then routes them back to the procurement specialists.<sup>19</sup> If the requesting department estimates the cost of an item to be under \$10,000, but the lowest price the procurement specialist can find for the item is over \$10,000, Parr's approval is required.<sup>20</sup> Parr testified that, in an average week, he approves three to four requests for requisitions over \$10,000.<sup>21</sup>

Procurement specialists have authority to execute purchase orders up to \$250,000 without additional approval,<sup>22</sup> which could happen if they aggregate multiple purchase

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<sup>18</sup> The record does not reveal whether Martin's superiors had to approve the initiative.

<sup>19</sup> Like the procurement specialists, Ramsey also needs Parr's approval for transactions over \$10,000, although she does not ordinarily execute purchase orders herself. The \$10,000 limit on the procurement specialists' spending authority was instituted in 2007, when the new INDUS software system was set up. It appears that, prior to that time the procurement specialists were subject only to the \$250,000 limit per purchase order, described below. Under the prior system, Pilgrim's Finance Department approved requisitions before they were sent to the technical specialists and procurement specialists. Parr testified that purchase orders are not routed to the Finance Department now, to his knowledge, and that "Corporate" is currently deciding what the threshold will be before Finance Department approval is required.

<sup>20</sup> As noted above, if the cost on an invoice for an item exceeds the price the vendor originally quoted to the procurement specialist, the procurement specialists have the leeway to approve invoices up to \$2500 over the quoted price. If a price increase brings the amount for the item to over \$10,000, however, Parr must approve it.

<sup>21</sup> On occasion, the procurement specialists have executed purchase orders over \$10,000 without obtaining the necessary approval by Parr. On February 27, 2008, Parr sent an e-mail to Ramsey, Martin, and Fennessey to the effect that "Corporate" had noticed that numerous requisitions over \$10,000 had been processed without Parr's prior approval, and that this should not be repeated, or it might result in a full audit. Martin replied that she knew she was guilty of not always getting approvals because of being understaffed and under the gun, and she suggested that the system should be set up so it would not allow her to approve such requisitions. Parr replied that he would ask about a filter or flag that could be implemented. Parr testified that there were a few more mishaps after that but that Martin is now complying.

<sup>22</sup> Ramsey reviews the purchase orders of the procurement specialists if they exceed the \$250,000 limit.

requisitions for amounts under \$10,000. For example, they could “batch” ten purchase requisitions in the amount of \$9000 each and execute a purchase order with a vendor for \$90,000, without Parr’s or Ramsey’s approval. Ramsey testified, however, that she could not think of a specific example where the procurement specialists exceeded the \$10,000 limit by batching smaller requisitions. Parr testified about one instance in which Martin batched a bunch of items purchased from vendor Fairbanks Morse for an amount well over \$100,000.<sup>23</sup> Ramsey or Parr would have to approve purchase orders in amounts over \$250,000, but there is no record evidence of any purchase order exceeding \$250,000.

There is no limit to the number of purchase orders the procurement specialists may approve. A purchase order line item report that was submitted into evidence indicates that between September 2007, when the INDUS system was implemented, and May 2, 2008, the three procurement specialists together have executed 855 purchase orders for a total amount of \$2,834,294. In 2006, the procurement specialists purchased material in the amount of \$4.9 million, and in 2005, they purchased material in the amount of \$9.1 million.<sup>24</sup>

#### Oversight of the procurement process

The procurement specialists are required to follow extensive written policies and procedures that govern the procurement process. The policies dictate, e.g., the documents that must be used to procure materials, how to draw up a purchase order, the manner in which payments are to be made, when to solicit bids, when and how to qualify vendors to provide safety and quality parts, when to use single source suppliers, when to use blanket orders for repetitive orders of common parts, when competitive bidding should be waived, and a variety of other directives. Any updates to the policies must be approved by Parr and his counterparts at the other Entergy nuclear plants. The procurement specialists do not play a role in formulating these policies and procedures.

Ramsey is responsible for overseeing the procurement process. Ramsey testified that the procurement specialists handle 95 to 98 percent of the purchase requisitions without any assistance from her. It appears, however, that the procurement specialists consult with Ramsey on a regular basis.<sup>25</sup> Ramsey sits in the same area as the

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<sup>23</sup> It does not appear that there is documentary evidence of this purchase order in the record, nor is it entirely clear from Parr’s testimony whether Martin batched a series of items that cost less than \$10,000, each of which she approved herself.

<sup>24</sup> In some years there are larger purchases than others due to a major overhaul of the plant equipment that occurs every two years.

<sup>25</sup> The procurement specialists may also consult with Parr in some cases. Parr testified about an instance in which Fennessey brought to his attention the substantial cost to purchase a larger quantity of items under a general service agreement. The two of them discussed the matter and chose another option.



procurement specialists and holds a daily 8 a.m. meeting with her staff, during which everyone discusses what they are working on. Ramsey notifies the procurement specialists of any emergent issues, such as broken equipment for which they must find parts quickly. The procurement specialists tell Ramsey about any parts that will not be available on schedule, and they talk over how to deal with it. She may recommend various solutions,<sup>26</sup> or they may find a solution independently. Ramsey will tell the procurement specialists if she agrees or disagrees with their reasoning in choosing between repairing or replacing a part.<sup>27</sup>

Ramsey also runs a weekly “parts shortage” meeting attended by her staff as well as representatives from Procurement Engineering, the scheduling department, the warehouse, and the quality control receipt inspector, during which the attendees discuss the status of parts ordered for scheduled maintenance activities and whether or not they will be able to meet the scheduled work dates.<sup>28</sup>

Every day, a “parts shortage” report is generated and distributed to the procurement specialists, Ramsey, the warehouse supervisor, the receipt inspector, Procurement Engineering, and the scheduling supervisor. Ramsey makes assignments to the procurement specialists through the parts shortage report, and they use it to prioritize their work. The procurement specialists prioritize their work based on the “need date” for the part and on whether there is an emergency need for the part.<sup>29</sup>

## **PROCEDURAL MATTERS**

### **The Union’s motion to block the petition**

At the hearing, the Union submitted a motion to block the UC case, pending the Region’s investigation of a ULP charge filed by the Union in Case 1-CA-44627, in which

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<sup>26</sup> She may suggest that they try an alternative source, see if the part can be expedited, talk to Procurement Engineering or the technical specialists, or notify the technical specialist who serves as their department’s “customer service representative,” so he can inform the requesting department.

<sup>27</sup> Entergy sends out parts in need of repair to vendors for evaluation of the repair cost. In deciding whether to repair the item versus purchase a new one, the procurement specialists consider the relative costs of the two options and whether the cost of repairing the item is less than or more than 50 percent of the cost of buying a new one. The procurement specialists may opt for repair, even if the cost of repairing a part is relatively expensive, if the part is obsolete and, therefore, unavailable or if they cannot obtain a new part in a timely fashion.

<sup>28</sup> Martin occasionally runs the parts shortage meeting if Ramsey is absent and keeps notes of the meeting.

<sup>29</sup> Ramsey and/or the work managers who need the part, rather than the procurement specialists, make the judgment that the procurement of a part is a priority or “time sensitive” or an emergency.

it contends that Entergy has changed the duties of the procurement specialists in a manner that has the potential consequence of removing them from the unit. I note that the Union did not pursue the request to block in its post-hearing brief. At the hearing, Entergy took the position that it does not rely on any recent changes to the duties of the procurement specialists in asserting their managerial status; rather it relies only on such authority as they have possessed for many years. Accordingly, I deny the Union's motion to block the UC case.

The Union's argument that positions historically included may not be excluded by means of a unit clarification petition

Relying on *Union Electric Company*,<sup>30</sup> the Union asserts that the petition should be dismissed on the ground that the procurement specialists have been included in the unit for repeated contracts. In that case, the Board dismissed a UC petition filed by a union that sought to *include* employees who had been *historically excluded* from the unit, holding that clarification is not appropriate for upsetting an agreement or established practice concerning unit placement, absent recent, substantial changes in duties. The Union appears to argue that, by extension, *Union Electric Company* stands for the proposition that positions *historically included* may not be *excluded* by means of a unit clarification petition, absent a change in duties.

In *Union Electric*,<sup>31</sup> however, the Board indicated that a possible exception to its principle of refusing to clarify longstanding units would be a situation involving agreed inclusion of individuals who are not employees within the meaning of the Act. Subsequently, in *The Washington Post Company*,<sup>32</sup> the Board held that it will clarify a unit to exclude a position that has historically been included, even where the job duties have remained unchanged, where it can be shown that the employees in dispute meet the test for establishing supervisory, managerial, or confidential status. See also, *University of Dubuque*,<sup>33</sup> *Bethlehem Steel Corp.*<sup>34</sup>

While acknowledging *The Washington Post*, the Union asserts, first, that these "suggestions" pronounced by the Board in *The Washington Post* were dicta that should be revisited. To the degree the Union is arguing for a change in Board law, that is a matter that can be resolved only by the Board.

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<sup>30</sup> 217 NLRB 666 (1975).

<sup>31</sup> *Id.* at 667, fn. 5.

<sup>32</sup> 254 NLRB 168, 169 (1981). The Board noted at fn. 17 that *Union Electric* did not warrant a contrary result, due to the possible exception noted in fn. 5 of *Union Electric*, as described above.

<sup>33</sup> 289 NLRB 349 (1988).

<sup>34</sup> 329 NLRB 243, 244 fn. 5 (1999).

The Union asserts, second, that *The Washington Post* is distinguishable. In this regard, during the representation proceeding in *The Washington Post*, unlike the instant case, the Regional Director expressly authorized the employer to contest the supervisory, managerial, and confidential status of certain positions by filing a post-election unit clarification petition, in exchange for the employer's agreement not to litigate their inclusion prior to the election. The Union argues that the Board permitted the UC petition to proceed because it was "clearly an offshoot of the earlier RC hearing," a circumstance not present here. The Union also cites *I.O.O.F. Home of Ohio, Inc.*<sup>35</sup> and *Premier Living Center*,<sup>36</sup> in which the Board barred the employers from contesting the supervisory status of LPNs, after an election in a stipulated unit that specifically included LPNs, because the supervisory issue could have been litigated in the prior representation hearing.

The Board recently set forth its view of the matter in *Goddard Riverside Community Center*,<sup>37</sup> in which an employer sought to exclude a historically included classification on supervisory grounds. The Board reaffirmed the principle of *The Washington Post* that it will entertain a unit clarification petition seeking to exclude employees who have long been included under previous contracts, even though their job duties remain unchanged, if it can be shown that they meet the test for supervisory status. It noted that an exception to this principle exists, as exemplified by *I.O.O.F. Home of Ohio, Inc.* and *Premier Living Center*, when a party has specifically stipulated in a representation case proceeding to the inclusion of a particular classification but later attempts to file a UC petition to exclude the classification on supervisory grounds. The rationale for the exception is to discourage parties from attempting to avoid being held to a stipulation that they entered into in a representation proceeding. Distinguishing those two cases, the Board determined to process the UC petition in *Goddard*, even though the disputed position had been in the unit for fourteen years when the petition was filed, because the stipulated election agreement in the representation case did not specifically include or exclude the disputed position.<sup>38</sup>

Here, there is no evidence that the parties ever specifically stipulated to include the procurement specialists in the unit during a representation proceeding.<sup>39</sup> In the absence of such evidence, the principles of *The Washington Post* require me to exclude

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<sup>35</sup> 322 NLRB 921 (1997).

<sup>36</sup> 331 NLRB 123 (2000).

<sup>37</sup> 351 NLRB No. 84 (December 28, 2007).

<sup>38</sup> The Board noted that the fact that the disputed position had been included in the unit by way of contract does not mean that their status had been specifically agreed upon in the representation proceeding.

<sup>39</sup> In addition, any such stipulation was over 50 years ago. Therefore, the fear expressed in *I.O.O.F.* and *Premier Living Center* that a party would try to avoid being held to a stipulation is remote.

the disputed employees from the unit, if they meet the test for managerial status, such that their inclusion violates the basis principles of the Act or Board policy.<sup>40</sup>

The Union's argument that Entergy stipulated to the inclusion of a similar position in another bargaining unit

The Union argues that the petition should be dismissed because Entergy has twice stipulated to include a position similar to that of the procurement specialists in a unit, in representation proceedings involving a different bargaining unit at Pilgrim. In this regard, in 2000, a different union, Teamsters Local 653, petitioned to represent a certain unit. At the insistence of Entergy, the position of "senior purchasing agent," now called "senior procurement specialist," was included in the unit. The Teamsters lost the election. Utility Workers Local 369 subsequently petitioned to represent a similar unit that eventually became the unit currently known as the technical unit. The *Norris-Thermidor* list for the August 2002 election in that second representation proceeding again included the senior purchasing agent in the unit, and the Union won the election. At the hearing, the Union elicited some testimony concerning the duties and responsibilities of the senior procurement specialist. It argues that the more highly ranked senior procurement specialist, who is currently represented, has arguably greater discretion than the procurement specialists at issue here. Citing *Goddard Riverside Community Center* and *I.O.O.F. Home of Ohio, Inc.*, the Union argues that Entergy's agreement to include the senior purchasing agent in two prior representation proceedings bars it now from asserting the managerial status of the procurement specialists.

I decline to extend the holding of the above cases to find that Entergy's prior agreement to include a different classification in a different bargaining unit precludes it from asserting the managerial status of the procurement specialists.<sup>41</sup>

**ANALYSIS**

Managerial employees are defined as those who formulate and effectuate management policies by expressing and making operative the decisions of their employer. They must exercise discretion within, or even independently of, established employer policy and must be aligned with management. Although the Board has established no firm criteria for determining when an employee is so aligned, normally an employee may be excluded as managerial only if he represents management interests by

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<sup>40</sup> I am not persuaded by the Union's attempt to distinguish *The Washington Post* on the ground that the UC petition in that case, unlike the instant case, was an offshoot of the earlier RC hearing. That was only one of several factors cited by the Board as a reason for processing the UC petition in *The Washington Post*. There was no suggestion that the Board would not have permitted the UC petition to proceed, absent the Regional Director's promise to entertain a UC petition after the election.

<sup>41</sup> In light of my determination, I decline to reach the issue of whether the senior procurement specialist has greater authority than the procurement specialists whom Entergy seeks to exclude.

taking or recommending discretionary actions that effectively control or implement employer policy. *Allstate Insurance Co.*<sup>42</sup> The party seeking to exclude individuals as managerial has the burden of coming forward with evidence necessary to establish such an exclusion. *Lemoyne-Owen College*;<sup>43</sup> *Montefiore Hospital & Medical Center*.<sup>44</sup>

Entergy asserts that the procurement specialists are managerial employees on the ground of their authority to select vendors and to commit significant sums of their employer's money.<sup>45</sup> The Board has held that the ability to commit an employer's credit in amounts which are substantial, especially where done through exercise of discretion which is not ordinarily reviewed, is strong evidence of managerial status. *Concepts & Designs*.<sup>46</sup>

I conclude that the procurement specialists are managerial employees. In this regard, they have authority to commit Entergy's credit for purchases up to \$10,000, a significant amount, without any review by their superiors.<sup>47</sup> They purchased materials in the amount of \$9.1 million in 2005, \$4.9 million in 2006, and \$2.8 million in the nine-month period beginning in September 2007, very substantial amounts. They handle 95 to 98 percent of the purchase requisitions without assistance from Ramsey. The procurement specialists have discretion to select vendors, taking into account cost, ability to meet the delivery schedule, and reliability. Although the procurement specialists must use vendors from an approved list for safety-related parts,<sup>48</sup> they have unfettered discretion to select the vendors from a variety of possible sources for non-safety-related parts, which constitute about half of their purchases. The procurement specialists negotiate with the vendors on behalf of Entergy over costs and fees and may seek another vendor if they are not satisfied.

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<sup>42</sup> 332 NLRB 759, 762 (2000), citing *NLRB v. Yeshiva University*, 444 U.S. 672, 682-683 (1980).

<sup>43</sup> 345 NLRB No. 93, slip op. at 6 (September 30, 2005).

<sup>44</sup> 261 NLRB 569, 572 fn. 17 (1982).

<sup>45</sup> At the hearing, Entergy stipulated that it is not seeking to exclude the procurement specialists because their responsibilities have changed during the life of the 2004-2008 agreement.

<sup>46</sup> 318 NLRB 948, ALJD at 957 (1995), enf'd. 101 F.3<sup>rd</sup>. 1243 (8<sup>th</sup> Cir. 1996).

<sup>47</sup> In the absence of evidence that they have ever done so, I do not rely on the procurement specialists' asserted authority to execute purchase orders up to \$250,000 without additional approval, which they could do theoretically by batching multiple orders for amounts under \$10,000. Rather, I rely on their authority to execute purchase orders for amounts up to \$10,000 without further approval.

<sup>48</sup> There is no evidence that they are required to select any particular vendor from the list.

The Board has found that employees with similar purchasing authority are managerial employees. *Concepts & Designs*<sup>49</sup> (employee found to be a managerial, where she possessed authority to determine which vendor would make timely delivery of parts at the best price, had discretion to change vendors, her discretion was not ordinarily reviewed by other officials, and her purchases in the prior year amounted to about \$2 million); *Simplex Industries, Inc.*<sup>50</sup> (buyer found to be managerial, where he was responsible for about \$5.75 million in annual purchases, issued and executed purchase orders without any approval or review of his actions, and had authority to initiate contacts with new suppliers and change suppliers unilaterally).

Similarly, the Board upheld the decisions of the Regional Directors in *Exelon Generation LLC*<sup>51</sup> and *Wolf Creek Nuclear Operating Corp.*<sup>52</sup> that individuals with similar purchasing authority were managerial employees.<sup>53</sup> In *Exelon Generation*, materials coordinators were found to be managerial, where they regularly exercised authority to make purchases for their employer, had the discretion to select vendors without any review by higher-level personnel in the case of purchases for less than \$25,000, and were encouraged to negotiate with vendors over price and to seek out new vendors if existing vendors could not satisfy the employer's requirements. In *Wolf Creek*, buyers at a nuclear plant were found to be managers, where they located vendors without supervisory approval and without reliance upon pre-approved lists, with the exception of safety items, for which they were limited to a list of approved suppliers but were not bound to select any particular supplier from the list. The buyers negotiated a purchase price and could initiate purchase orders in substantial amounts without prior approval. Although the buyers could not expend any more on a particular requisition than the spending authority of the signatory requisition manager, they had discretion to spend any amount within that authority.<sup>54</sup>

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<sup>49</sup> Id.

<sup>50</sup> 243 NLRB 111, 112-113(1979).

<sup>51</sup> Regional Director's Decision and Order, Case 4-RC-20670 (August 7, 2003).

<sup>52</sup> Decision, Order and Clarification of Bargaining Unit, Case 17-UC-210 (May 4, 2000).

<sup>53</sup> I take administrative notice of the fact that the Board denied Requests for Review of the Regional Directors' decisions in both of these matters.

I decline to rely on *Entergy Operations, Inc.*, Case 15-RC-8606, cited by Entergy, in which the Regional Director found that buyers and coordinators at the River Bend Nuclear Station were managerial employees based, *inter alia*, on their exercise of discretion in making purchases. I take administrative notice of the fact that there was no Request for Review of the Regional Director's Decision and Order in that case. Unreviewed Regional Director decisions have no precedential value. *The Boeing Company*, 337 NLRB 152, 153 fn. 4 (2001).

<sup>54</sup> In *Wolf Creek*, every requisition was approved by a manager's signature that limited the amount that could be expended on any particular requisition. For example, a section manager

The Union contends that the procurement specialists are not managerial employees because they played no role in formulating Entergy's procurement policies. While evidence that the procurement specialists formulated procurement policies might have been one basis for finding them to be managerial, it is not the only possible basis. Here, Entergy relies on a different factor, the procurement specialists' unreviewed discretion to pledge substantial amounts of credit, which, as demonstrated by the above-cited cases, the Board has held to constitute a basis for a finding of managerial status.

The Union also contends that the procurement specialists are not managers because Entergy's procurement policies, which they had no hand in formulating, circumscribe their discretion to an overwhelming extent. In support of this argument, the Union cites cases such as *Bell Aerospace*,<sup>55</sup> in which the Board found buyers were not managerial where, *inter alia*, numerous comprehensive manuals and instructions restricted their discretion in making purchases.<sup>56</sup>

More recently in *Exelon Generation*, however, the Board upheld the Regional Director's finding that material coordinators were managerial, where the employer's policies governing the purchasing function were very general, primarily established the procedures to be followed, and did not interfere with the material coordinators' exercise of discretion in locating and selecting vendors and negotiating over price, quality, and delivery requirements.<sup>57</sup> I find, similarly, that the procurement specialists' discretion to make purchases up to \$10,000 and to select vendors is not significantly limited by Entergy's procurement policies, which primarily address procedural matters.

The Union argues, citing *Solartec, Inc.*<sup>58</sup> and *The Washington Post Company*,<sup>59</sup> that the procurement specialists lack sufficient independent discretion in pledging Entergy's credit to qualify as managerial employees. These cases do not require a different result. In *Solartec*, a large machine department leader in a manufacturing

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could authorize spending up to \$25,000, a division manager could authorize spending up to \$50,000, and the COO could authorize spending up to \$150,000.

<sup>55</sup> 219 NLRB 384, 386 (1975).

<sup>56</sup> I acknowledge that, in finding the buyer in *Simplex Industries, Inc.*, *supra*, to be a manager, the Board noted, *inter alia*, that the buyer performed his job without the guidance of any employer-imposed procurement policies.

<sup>57</sup> Similarly, in *Wolf Creek Nuclear Operating Corp.*, *supra*, the Board upheld the Regional Director's finding that buyers were managerial, although their employer maintained a written policy required them to conduct a competitive bid process for goods or services expected to exceed \$5000 in value.

<sup>58</sup> 352 NLRB No. 52 (April 11, 2008).

<sup>59</sup> 254 NLRB 168, 189 (1981).

facility was found to be non-managerial, where there was no evidence he had any personal responsibility for choosing or rejecting vendors, he functioned as a conduit for vendors to introduce their products to his employer, and he consulted with his superior, who had to approve all requisitions, prior to submitting them. The assistant purchasing manager found to be non-managerial in *The Washington Post* appears to have exercised less discretion than the procurement specialists, because he had to clear decisions with higher department or company authorities on occasion and it appears that the dollar amounts involved in each purchase may have been smaller.

Finally, the Union cites the following:

...under the Respondent's theory, it could be said of anyone who places an order for merchandise, without more, that the employee is a managerial employee because he pledges an employer's credit. The Board certainly did not intend such a result when it carefully evolved the case law defining a managerial employee. Circumstances such as nature, scope, discretion, and other duties, must be considered in deciding this.

*Jerry's United Super.*<sup>60</sup> Here, I find that the degree of discretion vested in the procurement specialists to select vendors, and the scope of their authority to purchase millions of dollars of materials, with no review by a higher authority for purchases up to \$10,000, is sufficient to confer managerial status.

### **CLARIFICATION OF BARGAINING UNIT**

**IT IS HEREBY ORDERED** that the collective-bargaining unit represented by the Petitioner be clarified to exclude the positions of procurement specialist I and II.

### **RIGHT TO REQUEST REVIEW**

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review this Decision and Direction of Election may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, DC 20570. This request must be received by the Board in Washington by September 3, 2008.

In the Regional Office's original correspondence, the parties were advised that the National Labor Relations Board has expanded the list of permissible documents that may be electronically filed with its offices. If a party wishes to file one of the documents which may now be filed electronically, please refer to the Attachment supplied with the Regional Office's initial correspondence for guidance in doing so. Guidance for E-filing can also be found on the National Labor Relations Board web site at [www.nlrb.gov](http://www.nlrb.gov). On the home page of the web site, select the **E-Gov** tab and click on **E-Filing**. Then select

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<sup>60</sup> 289 NLRB 125, 143 fn.119 (1988).



the NLRB office for which you wish to E-File your documents. Detailed E-filing instructions explaining how to file the documents electronically will be displayed.

/s/ Rosemary Pye

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Rosemary Pye, Regional Director  
First Region  
National Labor Relations Board  
Thomas P. O'Neill, Jr. Federal Building  
10 Causeway Street, Sixth Floor  
Boston, MA 02222-1072

Dated at Boston, Massachusetts  
this 20<sup>th</sup> day of August 2008.